

In the Matter of Merchant Mariner's Document No. 80353D1 and All
Other Seaman's Documents
Issued to: FRANK B. MILTON

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1481

FRANK B. MILTON

This appeal has been taken in accordance with Title 46 United States Code 239b and Title 46 Code of Federal Regulations 137.30-1.

By order dated 22 May 1964, an Examiner of the United States Coast Guard at Philadelphia, Pennsylvania, revoked Appellant's seaman's documents upon finding a "charge of narcotics violation - proved". The charge was supported by a single specification which alleged that Appellant while a holder of an outstanding Merchant Mariner's Document was convicted on or about 20 April 1961 by the Superior Court of Camden County, State of New Jersey, a court of record, for violation of the narcotic drug laws of the State of New Jersey.

At the hearing Appellant elected to act as his own counsel. Although described in the charge sheet as done under authority of the Act of July 15, 1954, (46 U.S.C. 239b) and the Administrative Procedure Act, the charge preferred was "misconduct" and the specification was as written above. At the arraignment Appellant pleaded guilty to this charge of misconduct and the specification as served upon him.

The Investigating Officer introduced properly certified court records as follows:

Indictment No. 49-60 which alleged that on 9 September 1960, Appellant unlawfully possessed a narcotic drug - heroin. A subsequent indictment, No. 317-60, which charged in the first count that Appellant on 24 and 25 August 1960 unlawfully had in his possession a narcotic drug - heroin, and in the second count charged that he sold heroin.

Abstracts of the minutes of the proceedings which reveal Appellant was found guilty on 21 February 1961, of both counts of possession and sale after trial, and was found guilty at another trial a plea of non vult contendere to the single count of Indictment No. 49-60 on 12 April 1961. Appellant was sentenced

from two (2) to two and one half (2 1/2) years in state prison for the crimes charged in the two (2) count indictment (No. 317-60) and from five (5) to five and one half (5 1/2) years confinement for the crime charged in the one (1) count indictment. Fines of fifty (\$50.00) dollars were also imposed in each case. The prison sentences were to be served consecutively. Both sentences were meted out on 20 April 1961 and the judgments entered on that day.

The Investigating Officer's case was concluded at a subsequent session which Appellant failed to attend. At this time however, the Examiner announced in open session the charge was proved by plea and the order was revocation.

Upon Appellant's appearance which was prior to entering a final decision, the Examiner reopened the hearing. Appellant was sworn and testified to matters in mitigation. He explained his unlawful association with drugs stemmed from addiction which developed after using morphine prescribed by medical doctors who treated him for head injuries he allegedly sustained on 10 October 1959, when a bus in which he was a passenger was in a collision on the Massachusetts Turnpike. Eight (8) documents which consisted of personal references and medical reports of three (3) physicians were offered by him.

BASES OF APPEAL

The appeal is in effect a plea for leniency. Appellant refers to the manner in which he became involved with narcotics, the effect of his convictions upon his life and property, that he was paroled after a minimum period of incarceration and that he is now physically and mentally fit to return to sea.

OPINION

The record reveals two errors toward which comment is directed. First, while the authority for the proceedings was correctly stated in the charge sheet and by the Examiner, both in his opening statement and when advising Appellant of his rights, as the Act of July 15, 1954, (46 U.S.C. 239b), the charge quoted was "misconduct" and not "conviction for a narcotic drug law violation". Secondly, the Investigating Officer offered evidence of convictions of crimes resulting from two separate trials although only a single specification supported the charge. In his decision, under Conclusion the Examiner wrote "Charge of Narcotics Violation - Proved".

A charge is a description of an offense in general terms (46 CFR 137.05-17 (a)) and should be supported by one or more specifications which set forth the facts which form the basis of the charge. The purpose of the specification is to enable the

person charged to identify the offense so that he will be in a position to prepare his defense (46 CFR 137.05-17(b)).

In these remedial proceedings the designation of a wrong charge is not ordinarily a grave material defect, provided the specification alleges an offense under 46 U.S.C. 239 or 239b and no one is misled. In the instant case it is clear that Appellant was aware of the offense to which he pleaded. The record indicates throughout that it was a conviction of a state narcotic law violation for which he was answering. For me to hold reversible error was made, there must be a showing that Appellant was prejudiced. None is demonstrated here.

The general rule is that a party cannot challenge an issue which is actually litigated if he has had actual notice and adequate opportunity to defend. Thus in the case of National Labor Relations Board v. Mackay Radio and Telegraph Co. 304 US 333 (1938), where despite changes in the complaint and a finding consistent with a withdrawn complaint, the court said, "While the respondent was entitled to know the basis of the complaint against it, and to explain its conduct in an effort to meet that complaint, we find from the record that it understood the issue and was afforded full opportunity to justify the action of its officers as innocent rather than discriminatory." Similarly in Kuhn v. Civil Aeronautics Board 183 Fed. 2d 839 (C.A.D.C., 1950), the court said, "The whole thrust of modern pleading is towards fulfillment of a notice-giving function and away from the rigid formalism of the common law." In this latter case, Kuhn, an aviator, had actual notice that an issue involving "lookout" was involved although it was not specifically alleged in the complaint. Despite this omission the court sustained the Board's suspension of the aviator's license. In consonance with the court's admonition that agencies should scrupulously avoid even approaching the limits beyond which violation of due process lie, Investigating Officers should use the proper charge in order that no question of notice may arise.

The second error was made when the Investigating Officer offered evidence which showed conviction of two separate narcotic law violations. This case is unusual in that both judgments of conviction stemming from the two trials were entered on the same day. A conviction is considered to have occurred on the date of such entry (Commandant's Appeal Decision Nos. 954 and 1145). Since proof of a single conviction of a narcotic law violation requires revocation (46 CFR 137.03-10(a)), the evidence of the second offense did not constitute prejudicial error.

The lengthy sentences imposed by the County Court, terminated by Appellant's release on parole after forty -eight (48) months of

imprisonment, indicate a serious involvement by him with narcotics. However, be that as it may, the complete record offers no reason to depart from the long consistent policy of the Coast Guard to revoke a seaman's documents when he has become involved with narcotics.

ORDER

The order of the Examiner dated at Philadelphia. Pennsylvania on 22 May 1964 is AFFIRMED.

W.D. Shields
Vice Admiral, United States Coast Guard
Acting Commandant

Signed at Washington, D.C., this 30th day of November 1964.

INDEX

CHARGES AND SPECIFICATIONS

- defective, specification not supporting charge
- variance, charge and specification not mutually supporting violation of other than cited charge

COURT CONVICTION, EFFECT OF

- narcotics, charged as misconduct

NARCOTICS

- conviction improperly charged as misconduct

NARCOTICS STATUTE

- conviction of violation charged as misconduct

PROOF

- necessity of corresponding to charge